

IN THE SUPREME COURT OF TEXAS

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No. 96-0244
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JOHNSON & HIGGINS OF TEXAS, INC., PETITIONER

v.

KENNECO ENERGY, INC., F/K/A ARMADA SUPPLY INC., RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS
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Argued on October 22, 1996

JUSTICE HECHT, joined by JUSTICE GONZALEZ and JUSTICE OWEN, and also by JUSTICE SPECTOR in Part II only, dissenting.

I do not disagree with the Court that prejudgment interest awards on common law contract claims should be guided by legislated policies for prejudgment interest on wrongful death, personal injury, and property damage claims. No good reason is advanced for having different prejudgment interest rules for different kinds of claims. In deference to the Legislature's adoption of a rule for some cases, it is appropriate for the common law to apply the same rule in other cases. I do disagree with the Court's holding that prejudgment interest should accrue during a period when the parties have agreed to take no action. Neither of the two purposes of prejudgment interest — encouraging prompt settlements and discouraging delay by defendants — can be served when parties agree to allow *the plaintiff* to delay deciding whether to file suit. The Court's argument that the plaintiff in this case reserved by agreement a right to prejudgment interest that it would not have had otherwise — in other words, that the defendant contracted to pay prejudgment interest for plaintiff's delay in filing suit — can hardly be taken seriously.

But I would not reach the prejudgment interest issue because I conclude that Kenneco Energy, Inc. (formerly Armada Supply Inc.) is not entitled to judgment against Johnson & Higgins of Texas, Inc. on any claim Kenneco asserts. I agree with the Court that Kenneco's negligence claim

is barred by limitations,* that there is no evidence to support Kenneco's fraud claim, and that Kenneco's claims for breach of contract based on Johnson & Higgins' failure to obtain lost profits coverage are precluded by findings in *Armada Supply Inc. v. Wright*, 665 F. Supp. 1047 (S.D.N.Y. 1987), *aff'd in part and rev'd in part*, 858 F.2d 842 (2d Cir. 1988). Contrary to the Court, however, I would hold that Kenneco's contract claims for Johnson & Higgins' failure to obtain contingency coverage are also precluded by the federal court's findings. Thus, I would render judgment for Johnson & Higgins.

Accordingly, I respectfully dissent.

I

Kenneco bought fuel oil from Petrobras in Rio de Janeiro for resale to Sun Oil Trading Corp. in New York. Kenneco's purchase price was the market value of the oil upon arrival in New York harbor. The resale to Sun was at a fixed contract price, which Kenneco hoped would be higher than the prevailing market price at the time of delivery. Kenneco's purchase was on a C.I.F. basis, meaning that although Kenneco took title to the oil in the Brazilian port, Petrobras was obliged to insure the oil during its voyage to New York. Kenneco's resale of the oil was not on a C.I.F. basis, so that it had no obligation to Sun Oil to insure the cargo during shipment. But while the oil was en route, a steep and steady decline in the fuel oil market moved Kenneco to obtain additional insurance to protect what appeared would very likely be a very substantial profit from the resale to Sun.

Kenneco's concerns were two. Petrobras had provided insurance from Brazilian underwriters for 110% of the purchase price, but because the purchase price was tied to the market, as the market fell, so did the amount of insurance, leaving a large part of the potential value of the oil at resale — and almost all of Kenneco's profits — uninsured. Kenneco sought to insure the oil at Sun's higher contract price. Kenneco was also concerned that the Brazilian underwriters might fail to pay a claim

* The Court holds that Kenneco's negligence action accrued when the insurer denied coverage, not when the lack of coverage was finally adjudicated years later. Johnson & Higgins does not argue for a different accrual date. I do not read the Court's opinion to foreclose the position, had it been argued, that Kenneco's negligence claim accrued even earlier, when Johnson & Higgins failed to provide the coverage Kenneco claims it requested, but that limitations was tolled until coverage was denied.

and so sought insurance against that contingency. Through its insurance broker, Johnson & Higgins, Kenneco sought assurance that its marine insurance policies issued by London underwriters would provide both increased value coverage and contingency coverage.

When the ship arrived in New York, the cargo was found to be contaminated, and some of it had been lost. Sun canceled the contract, and eventually Kenneco sold some of the oil at a reduced price. The London and Brazilian underwriters disputed Kenneco's claims, so Kenneco sued them — but not Johnson & Higgins — in the Unitee, the London underwriters contended that the increased value coverage applied only to damages from the destruction of the oil and not to damages from Sun's cancellation of the contract, and that the contingency coverage applied only if Kenneco's purchase and resale were both on C.I.F. terms, and its sale to Sun was not. Kenneco argued that Johnson & Higgins had agreed to provide Kenneco with the coverage it claimed, and that because Johnson & Higgins was the London underwriters' agent, the underwriters were bound by that agreement.

The federal district court's finding that Johnson & Higgins was not the London underwriters' agent was sufficient reason to deny Kenneco's claims, but the court went further. It also found, in the words of the Second Circuit on appeal, that Kenneco "did *not* ask for, nor did [Johnson & Higgins] agree to, coverage on lost profits" as Kenneco contended. *Armada*, 858 F.2d at 851. This Court holds, and I agree, that because the federal district court's findings of no agency and no agreement regarding increased value coverage were both affirmed on appeal, relitigation of either is barred by collateral estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. o (1982). But contrary to the Court, I believe a fair reading of the federal district court's opinion shows that it also found that Johnson & Higgins did not agree to provide the contingency coverage Kenneco requested, and that finding, too, was affirmed on appeal.

The federal district court found that Johnson & Higgins' representative, Anderson, did not know because Kenneco's representative, Brown, did not tell him that Kenneco's sale to Sun was not on C.I.F. terms. Specifically, the federal district court found:

- “She [Brown] did not state what she told Anderson about whether the Sun contract was or was not C.I.F.” *Armada*, 665 F. Supp. at 1059.
- “As to the question of coverage under the contingency clause, Anderson understood Brown to say that both the Petrobras-Armada sale and the Armada-Sun sale were C.I.F. sales. As already stated, this was contrary to the fact.” *Id.* at 1061.
- “It is important to note that [it was not until after the meeting between Brown and Anderson and after the dispute arose], according to evidence in this case, that Armada had affirmatively stated that the sale to Sun was on a delivered, rather than a C.I.F. basis.” *Id.* at 1062.

Anderson could not have agreed to provide contingency coverage despite the fact that the sale to Sun was not on C.I.F. terms when, as the federal court found, Anderson understood from what Brown told him that the sale to Sun *was* on C.I.F. terms. In other words, Anderson could not have agreed to provide coverage he did not even know was being requested. Thus, the federal district court found that “Johnson & Higgins did not clearly understand the situation and mistakenly billed Armada for a premium for contingency coverage.” *Id.* at 1062. The Second Circuit approved this finding. *Armada*, 858 F.2d at 851 (“The evidence indicates that [Johnson & Higgins] mistakenly billed Armada for this coverage”). If Johnson & Higgins did not understand that Kenneco was requesting coverage even though the sale to Sun was not on C.I.F. terms, it could hardly have agreed to provide such coverage.

A simpler example makes the point clearer. Suppose a person wants an automobile policy that applies throughout Mexico, but he does not tell the agent, and the agent understands from what the person says that the car will not be operated in Mexico. The agent procures a policy that clearly limits coverage to operations in the United States. When the insured is involved in an accident in Mexico City, how can he successfully claim that the agent agreed to provide coverage? Once it is established that the agent did not know the automobile would be operated in Mexico, that fact precludes an agreement to provide such coverage.

The federal district court expressly found that Kenneco did not tell Johnson & Higgins that it wanted contingency coverage for a transaction that did not involve back-to-back sales on C.I.F. terms, Johnson & Higgins understood from Kenneco that the transaction *did* involve back-to-back

sales on C.I.F. terms, and Johnson & Higgins provided an insurance certificate that clearly conditioned coverage on back-to-back sales on C.I.F. terms. These facts having been determined, Johnson & Higgins cannot be said to have agreed to provide the contingency coverage Kenneco claims it wanted, or to have represented that it would provide such coverage. Had the federal district court concluded otherwise, it would not have been necessary to address, as it did, Kenneco's argument that the back-to-back C.I.F. requirement was waived.

Kenneco had full opportunity to litigate in its federal suit whether Johnson & Higgins agreed to provide contingency coverage applicable in Kenneco's circumstances. It could not prevail on its claim against the London underwriters without proving either a representation by Johnson & Higgins that it would obtain the coverage, or a waiver of the back-to-back C.I.F. sales requirement. Having lost on both grounds, it should not be allowed to relitigate the issue in Texas.

II

"The purpose of a standstill agreement," the Court explains, "is normally to maintain the status quo and temporarily suspend or stop all aspects of a suit. In most circumstances, this would operate to toll the accrual of prejudgment interest while the agreement is in effect." *Ante* at _____. Prejudgment interest encourages early settlements and discourages delay by defendants. Obviously, a plaintiff who wishes to maintain the status quo can hardly complain of a defendant's delay or failure to settle. A plaintiff should not be entitled to prejudgment interest for a delay he has requested and agreed to.

The Court nevertheless holds that Kenneco should recover prejudgment interest while the standstill agreement was in effect because Johnson & Higgins contracted to pay interest during such period. One would naturally think that if anyone should pay for a delay in the running of limitations requested by the plaintiff, it should be the plaintiff. While it is certainly possible that a defendant might agree not only to delay the running of limitations but also to pay a plaintiff interest for that delay, no reason for such an agreement suggests itself, and the Court supplies none. The Court's position is simply that by the language of their agreement, Johnson & Higgins agreed to pay Kenneco

prejudgment interest for the delay Kenneco requested, strange as that may seem. The only language to which the Court points is this:

Except as expressly provided, nothing in this agreement, or the recitals set forth herein, shall prejudice, influence or in any way affect any rights, liabilities, defenses, counterclaims or setoffs which may be asserted by either party hereto in this or any other proceeding.

By this language both parties attempted to preserve their rights. Since as a general rule, according to the Court, a defendant would not owe prejudgment interest while a standstill agreement was in effect, Johnson & Higgins should have preserved its right not to pay interest for that period, and Kenneco had no right to interest to be preserved. The Court simply changes the phrase, “which may be asserted by *either party*”, to “which may be asserted by Kenneco”. Misconstrued, the language does not preserve each party’s rights but gives Kenneco more rights than it would otherwise have had and takes away a right of Johnson & Higgins’.

Had the quoted sentence been omitted, the Court would hold that Kenneco had no right to prejudgment interest during the period of the standstill agreement:

That “right” [not to pay prejudgment interest during a standstill period], which may exist under a general stipulation, was eliminated because the stipulation protected the full scope of Kenneco’s rights and J&H’s liabilities.

Ante at ___ n. 13. That is, Johnson & Higgins’ preservation of the full scope of its rights under a standstill stipulation means that it preserved all but one, the right not to pay prejudgment interest during the period. The absurdity of this Orwellian doublespeak and consequent result is lost on the Court.

Nathan L. Hecht
Justice

Opinion delivered: December 11, 1997